LIBRARY
SUPREME COURT, U. S.

Office Supreme Court, U.S.
FILED
APR 25 1958
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 898

NORTON D. McKINNEY,

Petitioner,

vs.

GEORGIA H. McKINNEY KELLEY,

Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VERMONT

ALBERT G. AVERY,
70 Pine Street,
New York 5, N. Y.,

Counsel for Petitioner.

DATAVIA TIMES, LAW PRINTERS,
DATAVIA N. Y.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 898

NORTON D. McKINNEY,

Petitioner,

vs.

GEORGIA H. McKINNEY KELLEY,

Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VERMONT

Petitioner respectfully submits this supplemental brief, at the suggestion of the Clerk, solely for the purpose of inviting the attention of this Court to certain important facts and circumstances in aid of his petition for a writ of certiorari which now appear in the record of this cause herein but which were not disclosed until after the docketing of this cause on April 4, 1958.

I.

As appears from the certiorari petition (pp. 2-3) the major questions presented thereby are:

> "1. Whether the highest Vermont court, by refusing to accept petitioner's uncontradicted, corroborated, competent and credible evidence establishing numerous substantial changes of circumstances since the

> 1953 custody decree which required its modification, denied petitioner due process of law;
>
> 2. Whether such court denied full faith and credit to the 1956 Connecticut decree which determined that respondent's former paramour and present husband was unfit to have custody of his own three children;" * * *
>
> (*McKinney v. Kelley*, 26 U. S. L. W. 3284, 3299).

It is now established, as hereinafter appears, that not only did the Vermont Supreme Court refuse "to accept" petitioner's undisputed evidence, including the prior Connecticut decree, *supra*, the Court never in fact even *received* such evidence which was withheld by the Clerk of the trial Court, the Rutland County Court, who is also Clerk of the State Supreme Court for that county (Appendix to Certiorari Petition p. 16).

II.

As appears from the record now on the file herein: on May 20, 1957 a preliminary hearing was held in the County Court at which two so-called "Meacham Exhibits" (Nos. 1 and 2) and three Petitioner's Exhibits were duly received in evidence (Nos. 1, 2 and 3), all relating to the motion of respondent's Vermont attorney of record, Sidney B. Meacham, to withdraw from the cause and the verifications given respondent's Connecticut attorney, Aaron L. Gersten, of the pendency of the Vermont proceedings. The matter was then adjourned by the presiding judge of the County Court to June 18, 1957, respondent was duly notified by the Court to procure a new Vermont attorney and she replied by letter to the Court dated May 29, 1957 that she did not care to appear and defend. The hearing on June 18, 1957 thereafter proceeded as an uncontested matter.

At the hearing on June 18th petitioner offered nine exhibits which were duly received in evidence. One of these was an exemplified copy of the prior Connecticut judgment roll *supra* (Petr.'s Ex. 3, *Kelley v. Kelley,* No. 104,446-J, Connecticut Superior Court for Hartford County), another was a certified copy of the record of respondent's remarriage to her paramour in Connecticut on September 21, 1956 (Petr.'s Ex. 1) and a third was a map or sketch of the area at Andover Lake, Connecticut where the child in question is now held by respondent and her new husband (Petr.'s Ex. 7). The remaining six exhibits were photographs: of petitioner's present house in Vermont (Ex. 2), of his two sons (Ex. 6) including the child in question, of the three small children of the paramour, Kelley (Ex. 5) and of the apartments of respondent at Glastonbury and East Hartford, Connecticut (Exs. 4, 9, 10) where she lived with Kelley over the period January, 1952 to September 21, 1956 under circumstances constituting adultery in Connecticut down to the date of her own divorce on February 3, 1953 (Conn. General Statutes (1949 rev.) Sec. 8545, Certiorari Petition Appendix, p. 33) and fornication thereafter, until her remarriage in 1956. (*id.* Sec. 8553, Cert. Petr. App. p. 33). This evidence was wholly undisputed.

Thereafter, on July 2, 1957 petitioner submitted his Requests for Findings to the County Court, incorporating therein the numerous facts established by the prior Connecticut judgment roll *supra* including the fact that

> "On June 28, 1952 Kelley deserted his own wife, Laura, and their three children, then aged six, three and one respectively."

On July 17, 1957 the County Court made its Findings of Fact (i.e. decision) wherein the exhibits *supra* were

described or referred to (*id.* paras. 2, 13 and 14) and on July 29, 1957 petitioner filed his thirty seven exceptions thereto, Exception (No. 9) was duly taken therein to the trial Court's refusal to find, as requested, the fact of the paramour's prior desertion of his own wife and three small children

> "on the ground that said fact was incontrovertibly established by the duly exemplified copy of the judgment roll of the Superior Court of the sister state of Connecticut in the cause entitled *Kelley v. Kelley*, No. 104,446-J, and, *as such, is entitled to full faith and credit in the Courts of Vermont as required by the full faith and credit clause of the federal constitution and by the Revised Statutes of the United States* (Petitioner's Exhibit 3, June 18, 1957)." (Italics ours.)

III.

Exception was also duly taken to the refusal to find, as requested, that the paramour was represented in the Connecticut action by respondent's Connecticut attorney, Gersten (No. 12), to the refusal of the trial Court to consider three Petitioner's Exhibits, Nos. 1, 2 and 3 (No. 13a) and to its refusal to find the facts of the paramour's unfitness to be the custodian of his own children as determined by the prior Connecticut Court judgment (Requests Nos. 17-21 incl.; Exceptions Nos. 29-33 incl.).

On August 17, 1957 the presiding judge of the County Court certified the entire record to the Vermont Supreme Court, for purposes of review, by a skeleton Bill of Exceptions which provided:

> "The * * * transcript of testimony, exhibits * * * and all other proceedings had herein in said County Court, including the records, files and docket entries herein are referred to and made a part hereof, * * *
>
> The transcript of evidence shall be controlling for the purpose of testing whether the findings and request

for findings are warranted by the evidence and whether there has been any abuse in the exercise of the court's discretion in refusing to find facts as requested to which abuse the petitioner has an exception. Exceptions allowed, further proceedings herein stayed and the cause passed to the Supreme Court, subject to amendment on or before September 1, 1957."

IV.

Notwithstanding this specific direction of the County Court presiding judge, petitioner's nine exhibits *supra* never went to the Vermont Supreme Court at all. This was disclosed, for the first time, on April 2, 1958 by the letter of Norman E. Peduzzi, Clerk of the Vermont Supreme Court, listing the documents he transmitted on that date to Mr. Fey, Clerk of this Court, wherein no mention was made of petitioner's nine exhibits received in evidence on June 18, 1957, although listing the five exhibits *supra* which had been received in evidence on May 20, 1957.

Inquiry promptly made thereupon disclosed that these nine exhibits were still with the County Court Clerk, George N. Harman. On April 11, 1958, he finally transmitted them to Mr. Peduzzi with a letter stating:

> "These exhibits were not shipped to you, with the file of the cause, because this cause going to the Supreme Court for argument on the County Court's dismissal of the libellant's petition to modify the order as to custody as to one of the minor children, *it did not occur to me that these exhibits were necessary for such arguments.*" (Italics ours.)

A carbon copy of this letter is on file herein. Under date of April 14, 1958 the Clerk of the Vermont Supreme Court forwarded the nine exhibits to the Clerk of this Court.

V.

From the foregoing it appears that not only was petitioner's undisputed proof never considered by the highest State Court, *it was not even received there* due to the arbitrary action of the trial Court Clerk who did not consider it was "necessary"—even though it included the judgment roll from a sister state which has now been denied full faith and credit. Petitioner's claim to denial of due process thus is powerfully corroborated by these newly discovered facts.

Since the evidence is undisputed this Court is at liberty to inquire whether it supports the judgment (*Kelley v. Rhoads*, 188 U. S. 1, 5). Likewise, it is submitted that there is no occasion here to evaluate conflicting evidence below, which dissenting opinions have frequently urged as a basis for the dismissal of certiorari writs as improvidently granted. The requirement that full faith and credit be given the Connecticut judgment roll is that it be generous and full, not niggardly. And the sister state judgment embraces all matters that were or could have been fairly decided thereby, including the issue of the fitness of the paramour to have custody.

Lastly, it is submitted that no useful purpose would now be served by ordering a remand to the Vermont Supreme Court with a direction to consider the evidence that was ignored below. Mr. Harman, was not only Clerk of the County Court, he was *also* Clerk of the Supreme Court for Rutland County (Certiorari Petition p. 16) and, as such, subject to all times to its direction and control. Even a cursory examination of the record below would have revealed the exhibits had not been forwarded with the testimony and that one of these voiced vital federal questions of full faith and credit which had been seasonably and squarely presented by exception for review.

Conclusion.

For the foregoing reasons it is submitted that the Petition for a Writ of Certiorari should be granted and this cause reviewed on its merits.

April 23, 1958.

ALBERT G. AVERY,
70 Pine Street,
New York 5, N. Y.,
Counsel for Petitioner.